(10)

No. 02-964

Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED December 2, 2002
CERTIORARI GRANTED May 27, 2003

55 pp

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following page in the printed appendix or supplemental appendix to the petition for a writ of certiorari:

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON (PORTLAND)

CIVIL DOCKET FOR CASE #: 3-98-00851-ST

MICHAEL REESE

v.

GEORGE BALDWIN, SUPERINTENDENT

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
07/10/1998	2	Petition for Writ of Habeas Corpus (2254) -- Conditions of Confinement (State) -- against *George Baldwin, Superintendent* Filing Fee collected. Receipt#: N/A issued. Filed by Michael Reese (Kirk,) (Entered: 03/24/2000)
07/10/1998	3	Motion for Appointment of Counsel. Filed by Michael Reese. (Kirk,) (Entered: 03/24/2000)
07/30/1998	4	Order: Granting Petitioners Motion for Appointment of Counsel (Related Doc #3); Federal Public Defender appointed; Signed 7/30/98 by Judge Janice M. Stewart. (Kirk,) (Entered: 03/27/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
12/09/1998	11	Answer to Habeas Petition (2254) *Response to Habeas Corpus Petition*. (Related Doc # 2) (related document(s)2) Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
12/09/1998	12	Exhibits *to Answer*. (related document(s)11) Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
12/09/1998	13	Motion *to Deny Habeas Corpus Relief*. Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
12/09/1998	14	Memorandum in Support *of Motion to Deny Habeas Corpus Relief*. Filed by George Baldwin. (Related motion(s)13) (Kirk,) (Entered: 03/27/2000)
03/11/1999	19	Amended Petition for Writ of Habeas Corpus (2254) (related document(s)2) Filed by Michael Reese (Kirk,)(Entered: 03/27/2000)
03/11/1999	20	Memorandum in Opposition *to Respondents Motion to Deny Habeas Corpus Relief*. Filed by Michael Reese. (Related motion(s)13) (Kirk,) (Entered: 03/27/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
04/06/1999	22	Response to Motion *for Leave to Amend Habeas Corpus Petition*. Filed by George Baldwin. (Related motion(s)18) (Kirk,) (Entered: 03/27/2000)
08/27/1999	38	Reply *Memorandum in Response to Petitioners Amended Petition & Memorandum and Objections to Petitioner's Exhibits*. (related document(s)19) Filed by George Baldwin. (Hickman, Camile) (Entered: 04/17/2000)
09/30/1999	39	Response *b Petitioner to Respondents Reply Memorandum*. Filed by Michael Reese. (Kirk,) (entered: 03/27/2000)
01/04/2000	40	Findings & Recommendations: Amended Habeas Corpus Petition SHOULD BE DENIED on Petitioners 1st ground for relief, conditionally GRANTED on Petitioners 4th ground for relief & DENIED as premature on Petitioners 2nd & 3rd grounds for relief. Accordingly, the State of ORegon should be required to reinstate Petitioners direct appeal from his second re-sentencing & to appoint counsel to represent Petitioner on that appeal; Signed on

DATE	DOCKET NUMBER	PROCEEDINGS
		1/3/2000 by Judge Janice M. Stewart. (related document(s)19) Objections to the Findings and Recommendation due by 1/24/2000). Response to the objection to the F & R due by 2/10/2000. (Kirk,) (Entered: 03/27/2000)
03/15/2000	45	Motion for Reconsideration. Filed by George Baldwin. (Kirk,) (Entered: 03/27/2000)
03/15/2000	46	Memorandum in Support *by Respondent of Motion For Reconsideration*. Filed by George Baldwin. (Related motion(s)45) (Kirk,) (Entered: 03/27/2000)
03/28/2000	49	Memorandum in Opposition *to Motion for Reconsideration*. Filed by Michael Reese. Reply due by 4/11/2000. (Related motion(s)45) (Kirk,) (Entered: 03/30/2000)
06/08/2000	50	Order Granting Motion for Reconsideration (Related Doc #45) and withdrawing Findings & Recommendation (Related Doc #40). Signed June 8, 2000 by Judge Janice M. Stewart. (St,) (Entered: 06/08/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
06/08/2000	51	Amended Findings & Recommendations: Signed on 6/8/2000 by Judge Janice M. Stewart. (related document(s)19) Objections to the Amended Findings and Recommendation due by 6/26/2000. Response to the objections due by 7/14/2000. (St,) (Entered: 06/08/2000)
07/10/2000	54	Objections to Findings & Recommendation *(Amended) Request for Oral Argument.* Filed by George Baldwin. (Related motion(s) 51) (Kirk,) (Entered: 07/10/2000)
08/01/2000	55	Record of Order by Judge Janice M. Stewart: Findings & Recommendations filed June 8, 2000, referred to Judge James A. Redden. Objections have been filed,(related document(s)51). (da,) (Entered: 08/01/2000)
09/14/2000	58	Affidavit of *the Honorable Mary J. Deits, Chief Judge of the Oregon Court of Appeals*. Filed by George Baldwin. (Kirk,) (Entered: 09/15/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
09/14/2000	59	Affidavit of *James W. Nass, Appellate Legal Counsel for the Oregon Court of Appeals*. Filed by George Baldwin. (Kirk,) (Entered: 09/15/2000)
09/14/2000	60	Record of Hearing before Judge James A. Redden on the Amended Findings and Recommendation and the defendant's objections (related document(s)51, 54). Respondent's supplemental brief due within 10 days by 9/25/2000. Petitioner is to advise the court if he will be filing a response; any response would be due after the supplemental brief. (dls,) (Entered: 09/19/2000)
09/26/2000	61	Supplemental Brief *Supplemental Briefing on Retroactivity*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
09/26/2000	62	Memorandum *Supporting Admission of Fical Impact Affidavits*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
09/26/2000	63	Affidavit of *David E. Groom, State Public Defender*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
09/26/2000	64	Affidavit of *Timothy M. Wood, Chief Trial Counsel, Trial Division, Oregon Department of Justice*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
09/26/2000	65	Affidavit of *Timothy A. Sylwester, an Attorney-In-Charge, Appellate Division, Oregon Department of Justice*. Filed by George Baldwin. (Kirk,) (Entered: 09/27/2000)
11/27/2000	66	Opinion & Order: I Adopt the Magistrate Findings & Recommendation that the amended Petition be denied as to the first ground for relief; I decline to adopt the Magistrate Judge's Findings & Recommendation as to the Second, Third & Fourth grounds for relief; those claims are denied & the state of Oregon is not required to reinstate Petitioners direct appeal from his second resentencing; Signed 11/27/00 by Judge James A. Redden. (related document(s)19) (Kirk,) (Entered: 11/28/2000)
12/06/2000	67	Judgment: Based on the record, IT IS ORDERED AND ADJUDGED that Petitioner's amended habeas corpus petition is denied and judg-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment is entered in favor of respondent. IT IS SO ORDERED. Signed 12/6/2000 by Judge James A. Redden. (related document(s)19) (da,) (Entered: 12/06/2000)
12/18/2000	68	Motion to Alter/Amend/Correct *Judgment*., Motion for Reconsideration. Response due by 1/2/2001. Filed by Michael Reese. (Kirk,) (Entered: 12/21/2000)
01/08/2001	69	Response to Motion *Response to Petitioners Motion for Reconsideration & to Alter or Amend Judgment.* Filed by George Baldwin. Reply due by 1/22/2001. (Related motion(s)68) (Kirk,) (Entered: 01/10/2001)
01/22/2001	70	Opinion & Order: Denying Petitioners Motion to Alter/Amend/Correct (Related Doc #68)& Order Denying Petitioners Motion for Reconsideration (Related Doc #68). Signed 1/22/01 by Judge James A. Redden. (See formal 4-Page Opinion & Order) (Kirk,) (Entered: 01/23/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
01/26/2001	71	Notice of Appeal to. *9th Circuit Court of Appeals from the Judgment entered on 1/22/01*. (related document(s)67) Filed by Michael Reese. (Kirk,) (Entered: 01/29/2001)
01/31/2001	72	Certificate of Appealability. Signed 1/31/01 by Judge James A. Reddin. (related document(s)71) (Kirk,) (Entered: 02/09/2001)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOCKET NO. 01-35153

MICHAEL REESE

v.

GEORGE H. BALDWIN

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/15/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : n. setting schedule as follows: appellant's opening brief is due 5/14/01; appellees' brief is due 6/13/01. [01-35153] (tm)
5/21/01	Filed original and 15 copies Appellant Michael Reese opening brief (Informal: n) 35 pages and five excerpts of record in 1volumes; served on 5/14/01 [01-35153] (tm)
6/29/01	Filed original and 15 copies appellee George H. Baldwin's 53 pages brief, served on 6/27/01 [01-35153] (tm)
7/30/01	Filed original and 15 copies Michael Reese reply brief, (Informal: n) 29 pages; served on 7/25/01 [01-35153] (tm)

DATE	PROCEEDINGS
11/9/01	ARGUED AND SUBMITTED TO Procter R. HUG, Thomas G. NELSON, Ronald M. GOULD [01-35153] (ms)
1/29/02	Filed Michael Reese additional citations, served on 1/25/02 (PANEL) [01-35153] (tm)
3/12/02	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Procter R. HUG; Thomas G. NELSON, dissenting; Ronald M. GOULD, author.) FII ED AND ENTERED JUDGMENT. [01-35153] (tm)
4/30/02	[4420389] Filed original and 50 copies Appellee George H. Baldwin petition for rehearing with suggestion for rehearing en banc 18 p.pages, served on 4/23/02 (PANEL AND ALL ACTIVE JUDGES) (tm)
5/30/02	Filed order (Ronald M. GOULD): Appellants' are ordered to file a response to the Petition for Rehearing. The response is not to exceed 18 pages, and must be filed no later than 21 days from the date of this order. (response is due 6/21/02) (Atys. notified, Faxed to Panel) [01-35153] (tm)
6/17/02	Filed Appellant's response to petition for rehearing and suggestion for rehearing en banc; served on 6/14/02 (PANEL AND ALL ACTIVE JUDGES) [01-35153] (tm)

DATE	PROCEEDINGS
9/3/02	Filed order (Procter R. HUG, Thomas G. NELSON, Ronald M. GOULD): The petition for enbanc rehearing is DENIED. [01-35153] (tm)
9/11/02	MANDATE ISSUED [01-35153] (tm)
12/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-964 filed on 12/2/02. [01-35153] (tm)
6/2/03	Received letter from the Supreme Court dated 5/27/03 re: motion for leave to proceed ifp is granted. The petition for a writ of certiorari is granted. [01-35153] (tm)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF UMATILLA

In the Matter of the Application of:	Case No. CV96 0561
MICHAEL REESE, Petitioner, vs. G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution, Defendant.	PETITIONER'S FIRST AMENDED PETITION FOR POST CONVICION RELIEF (ORS 138.510 et seq.)

COMES NOW the Petitioner, Michael Reese, by and through his attorney, Wade P. Bettis, Jr., of Bettis & Penz, and alleges as follows:

1

Petitioner is imprisoned in the Eastern Oregon Correctional Institution at 2500 Westgate, Pendleton, Oregon, and is unlawfully confined and restrained of liberty by the above-named Defendant.

2

The offense with which Petitioner was charged was that of Kidnapping I – 2 counts, Attempted Sodomy I. Petitioner was convicted of Kidnapping I – 2 counts by a trial without jury.

3

Petitioner's imprisonment is by virtue of a judgment and a sentence imposed by the Polk County Circuit Court in the case of The State of Oregon vs. Michael Reese, Case No. 91P-3012. The judgment sentences Petitioner to 260 months to run concurrent 260 months for Kidnapping, to run consecutive a 36 months for Attempted Sodomy. Imprisonment is by the Corrections Division.

4

Appeals regarding the issues of sentencing was taken from said conviction, and no prior proceedings under the Post Conviction Act have been taken.

5

Petitioner, at the present time, is financially unable to retain counsel. At all times material herein, Petitioner was represented by attorney David Hassenstab 236 SW Mill, Dallas, Oregon, at trial and sentencing in 1991. Mr. Hassenstab also represented Petitioner in Petitioner's first re-sentencing in March, 1993. Petitioner appealed and was represented by Sally Avera and William Barton on this third appeal which was affirmed without opinion in 1995.

6

Petitioner believes the sentence was and is illegal in the proceedings as set forth above which have resulted in a substantial denial of Petitioner's rights in violation of ORS 138.530 as follows:

(a) The Court imposed an excessive and improper sentence when it sentenced Petitioner to consecutive sentences;

(b) The Court imposed an unlawful and improper sentence when it sentenced Petitioner as a dangerous offender pursuant to ORS 161.725 to ORS 161.735;

(c) The Court imposed an improper and excessive sentence when it departed from the sentencing guidelines presumptive sentence;

(d) The Court accepted the waiver of jury without properly determining whether said jury waiver was voluntarily and intelligently made;

(e) The Court failed to insure that Petitioner received a fair and impartial trial when it allowed evidence of prior bad acts without first determining if presentation of said evidence was relevant or if the probative value of such evidence had been proven; and

(f) The Court erred when it disregarded the decision made by the Court of Appeals and imposed a sentence on Petitioner which dissented from the directions of the Court of Appeals.

7

Petitioner was denied adequate assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon, in that defense counsel failed to:

(a) Fully and properly investigate and prepare Petitioner's case including but not limited to, obtaining the victim's report and records which would have shown inaccuracies and false statements made by the victim at trial;

(b) Adequately represent Petitioner at trial and sentencing;

(c) Properly advise and counsel Petitioner regarding the ramifications of his waiver of jury as opposed to proceeding to a jury trial;

(d) Object to the Court's failure to ascertain whether the jury waiver was voluntarily and intelligently made;

(e) Provide Petitioner with professional advise and/or guidance regarding the charges against him;

(f) Failed to present evidence and facts important to Petitioner's case, including but not limited to the interviewing and subpoenaing of witnesses to testify on behalf of Petitioner.

(g) Move for Omnibus Hearing or file a Motion in Limine regarding prosecution's entering evidence of prior bad acts;

(h) Move for mistrial when Court unlawfully allowed evidence of prior bad acts when criteria for entering of such evidence had not been met;

(i) Withdraw as counsel when it became evident that Petitioner was not satisfied with his representation and requested that he withdraw from his case;

(j) Properly inform the court that Petitioner had not waived his right to appear and request a continuance. Instead, counsel appeared without Petitioner and a sentence was issued;

(k) Object to prosecution's unfounded allegation that Petitioner was suffering from a severe personality disorder.

8

PROSECUTORIAL MISCONDUCT

Petitioner was denied a fair trial by the Prosecution when the District Attorney, Fred Avera, engaged in misconduct that

severely prejudiced Petitioner's Constitutional rights which was a substantial violation of Petitioner's rights and is prosecutorial misconduct. More specifically the prosecution:

a. Called witnesses to testify against Petitioner when the witnesses could not identify Petitioner;

b. Entered into evidence certain information which he had previously agreed not to refer to during the trial and;

c. Petitioner was arraigned by Indictment on January 2, 1991. Fred Avera, without properly amending the indictment, unlawfully changed the date of indictment to January 9, 1991.

9

Petitioner was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United State and under Article I, Section 11, of the Constitution of Oregon, in that counsel on appeal failed to:

a. Withdraw as attorney for Petitioner due to conflict of interest in that her husband, Fred Avera, had been the attorney for prosecution three times on Petitioner's cases;

b. Notify Petitioner in advance when she removed Petitioner's attorney David Allen, from Petitioner's case and became attorney of record for Petitioner without Petitioner's consent;

c. Raise issues that had been preserved for appeal;

d. File a timely Notice of Appeal;

e. Obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal.

Taken alone or in any combination, the above caused prejudice to the Petitioner.

WHEREFORE, Petitioner prays for an Order:

1

Reversing the conviction and sentence in the case of The State of Oregon vs. Michael Reese, Case No. 91F-3012, in the Circuit Court of the State of Oregon for the County of Polk;

2

Releasing Petitioner from custody of the Defendant; and/or

3

Modifying the sentence; and

4

For such further relief as this Court deems just and proper.

DATED this 4 day of November, 1996.

BETTIS & PENZ

By s/Wade P. Bettis, Jr.
WADE P. BETTIS, JR.
OSB #72025
Attorneys for Petitioner
1906 Fourth Street
La Grande, OR 97850
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[Certificate of service omitted in printing.]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTIES OF MORROW AND UMATILLA
Department No. 1

RUDY M. MURGO **TELEPHONE NO. 541-278-0341**
DISTRICT COURT JUDGE **FAX NO. 541-278-0341**

Michael Lloyd Reese

Petitioner,

vs.

CV960561

G.H. BALDWIN Superintendent Eastern Oregon Correctional Institution,

MEMORANDUM OF OPINION

Defendant.

I. THE PLEADINGS

A. THE PETITION

This is a petition for post-conviction relief. The first amended formal petition was filed on 6 November 1996. His allegations of violations of his ORS 138.530 rights are set forth on pages 2 through five of his petition.

B. THE ANSWER

The defendant filed his answer on 15 November 1996. He denies the allegations. He also raises two affirmative defenses. First that the claims are barred under the rule of ***Palmer v. State of Oregon***, 318 Or 532 (1994).

He also alleges the claims that could have been raised on direct appeal are barred.

II. THE HEARING

A. 21 MARCH 1997

A hearing was held on 21 March 1997. Petitioner was personally present and appeared with his counsel, Mr. Wade Bettis, Jr. Esq. Defendant appeared through his legal counsel, Mr. Tom Denny, Esq., Assistant Attorney General.

B. EXHIBITS

The following exhibits were offered by the defendant and were admitted into evidence.

Number	Description
101	Second Amended Judgement
102	Presentence Investigation
103	Transcript
104	Petitioners Deposition
105	District Attorney Affidavit
106	Defendant's Trial Counsel Affidavit

C. TRIAL MEMORANDUM

The court received the trial memorandum submitted by the defendants legal counsel as well as the memorandum prepared by the petitioner himself.

D. WITNESSES

The defendant testified personally at the hearing.

III. FACTS

The petitioner is presently incarcerated in the Eastern Oregon Correctional Institution in Pendleton, Oregon. He is

serving terms of 260 months for kidnapping in the first degree, 260 months concurrent to the kidnapping charge for a second count of kidnapping in the first degree. He is also serving a sentence of 36 months consecutive to the kidnapping sentences for a conviction for attempted sodomy in the first degree. (See exhibits 101 and 103). His latest sentencing was after the case had been remanded to the trial court for resentencing. Id. At the time of the latest sentencing the District Attorney withdrew his request for a dangerous offender sentence and the court using a "durational departure" doubled the presumptive sentence of 130 months to 260 months for counts 1 and 2. It stated the aggravating factors on the record pursuant to the guidelines. The prior sentence on the sodomy charge remained the same. The defendant has a substantial criminal record for similar past crimes. (See exhibit 102). The defendant was convicted of the above crimes by the court, after the defendant had executed a written waiver of jury. (See exhibit 105, exhibit A).

IV. LEGAL ANALYSIS

A. BURDEN OF PROOF

The burden of proof in this case is on the petitioner. ORS 138.620(2).

B. ALLEGED TRIAL COURT ERROR

1. Sentencing

The allegation that the petitioner received an unlawful dangerous offender sentence is factually inaccurate. The court made the factual findings for both upward departure sentences and for the consecutive sentence. ORS 137.123(5).

2. Waiver Of Jury

This Claim lacks merit. It could have been raised on direct appeal and was not. ORS 138.550. The court also inquired of the petitioner before proceeding to a judge trial. (See exhibits 105 and 106).

3. Fair and Impartial Trial

This claim is barred under the rule of Palmer, supra.

4. Re-Sentencing

This allegation is meritless. The trial court followed the direction of the Oregon Court of Appeals.

C. ADEQUATE ASSISTANCE OF COUNSEL

Petitioner received adequate assistance of trial counsel. ***Strickland v. Washington***, 466 U.S. 668 (1984). See also ***Krummacher v. Gierloff***, 290 Or 867 (1981).

D. ADEQUATE INVESTIGATION

In his deposition, petitioner testified about the work of the investigator including talking to the defendant, visiting the crime scene and interviewing witnesses. (See exhibit 104).

E. ADEQUATE APPELLATE COUNSEL

Appellate counsel need not present every colorable issue. ***Jones v. Barnes***, 463 U.S. 745 (1983).

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V. CONCLUSION

Petitioner's claim for post-conviction relief is without merit. It is denied. Mr. Denny will prepare the appropriate order, submit it to Mr. Bettis for approval as to form and then submit it to the court for signature. Thank you both for your patience and professional courtesies.

Sincerely,

s/Rudy M. Murgo
Rudy M. Murgo
District Court Judge

RMM/mlh

cc: The Honorable John W. Hitchcock

CIRCUIT COURT OF OREGON

UMATILLA COUNTY

MICHAEL L. REESE,

Petitioner,

v. No. CV96-0561

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution, JUDGMENT

Defendant.

The above case came on for trial on March 21, 1997, before the Honorable Rudy M. Murgo. Petitioner appeared in person and by his attorney, Wade Bettis, Jr., and defendant appeared by and through his attorney, Thomas Castle, Assistant Attorney General.

The court, having considered all evidence and arguments before it,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that, based on the Court Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

DATED this 18 day of July, 1997.

s/Rudy M. Murgo
Rudy M. Murgo
Circuit Court Judge

Submitted by: Curt H. Pham
Assistant Attorney General
of Attorneys for Defendant

Court Reporter:

[Certificate of service omitted in printing.]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHAEL L. REESE,

Petitioner-Appellant,

v.

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution,

Defendant-Respondent.

Trial Court
Case No. CV96-0561

PETITION FOR POST-CONVICITION RELIEF

Appellate Court
Case No. A98705

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Umatilla County
Honorable Rudy M. MURGO, Judge

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109 East 5th Street
The Dalles, Oregon 97058
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Attorney for Appellant

HARDY MYERS #64077
Attorney General
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Solicitor General
400 Justice Building
Salem, Oregon 97310
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Attorneys for Respondent

Statement of Facts

This is a petition for post-conviction relief. Petitioner appeals the Judgment dismissing the petition.

The Petitioner is presently incarcerated in the Eastern Oregon Correctional Institution.

Petitioner is serving terms of 260 months for kidnapping in the first degree, and 260 months concurrent to the kidnapping charge for a second count of kidnapping in the first degree. Petitioner is also serving a sentence of 36 months consecutive to the kidnapping sentence for a conviction of attempted sodomy in the first degree.

Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury trial, failure to provide a fair and impartial trial, improper re-sentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

ARGUMENT

This brief is submitted in accordance with ***State v. Balfour***, 311 Or 434, 451-53, 814 P2d 1069 (1991), and pursuant to the provisions of Oregon Rule of Appellate Procedure 5.90.

The standard of review herein is whether the previous court committed an "error substantially affecting the rights of a party." ORS 19.125(2).

Respectfully submitted,

s/Marc Geller
Marc Geller OSB #97126
Attorney for Appellant

APPELLANT'S BRIEF

PART B

ARGUMENT (CON'T)

Petitioner's claims of error are set forth in Petitioner's Petition for Post Conviction Relief. The Petition is set forth, in pertinent part, below.

* * *

1

[P]etitioner's is unlawfully imprisoned and restrained of liberty by respondent at the Eastern Oregon Correctional Institution (EOCI), Pendleton, Umatilla County, Oregon.

2

Petitioner's imprisonment is by virtue of a judgment and sentence imposed by the Polk County Circuit in the case of State of Oregon v. Michael Lloyd Reese, Case No. 91P-3012; conviction date February 1991; sentencing date July 1991; the sentencing judges name was the Honorable John W. Hitchcock; and sentence imposed was 30 years run concurrent with 30 years run consecutive with 36 months.

3

Petitioner was originally charge by indictment with the offenses of: count one, Kidnaping in the first degree, and count two, of Kid-

naping in the first degree, and count three, of attempted Sodomy in the first degree. And was convicted of all three counts after a trial by Judge.

4

Petitioner was represented at trial level by David Hassenstab Attorney at Law for County of Polk's Public Defenders Office

5

Petitioner did appeal and appeal was undertaken to the court of Appeals and the result was: sentence was overturned in December 1992 and resentencing was done in March 1993. The attorney of record was David K. Allen, Deputy Public Defender.

6

Petitioner did re-appeal and appeal was undertaken by the Court of Appeals and again sentence was vacated by the Court of Appeals in July 1994. The attorney of the record was David K. Allen Deputy Public Defender and on the brief was Sally L. Avera, Public Defender.

7

Petitioner did appeal resentencing of September 12, 1994 after being held illegally by Yamhill County on the order of Theodore R. Kulingoski #70080, Attorney General. Appeal was AFFIRMED WITHOUT OPINION and was filed with the court's on May 31, 1995.

The petitioner was represented on record by Sally L. Avera. Appeal was not undertaken to the Supreme Court because the Oregon Public Defender's office refused at the last minute to file a petition for review for the Plaintiff at the request of the petitioner as will be shown on record.

8

Petitioner has not previously applied for Post-Conviction Relief pertaining to this case dated May 31, 1995, case number 91P-3012; Appellant number CA A85890.

9

Petitioner is informed and believes his imprisonment is illegal or unlawful and obtained in violation of ORS 138.530 and that my incarceration is a hazard to my well being because:

First Claim for Relief: Conflict of interest involving the representation of Sally L. Avera on April 26, 1995.

Facts: On April 26, 1995 the case of petitioner was argued or submitted before the court of Appeals before Richardson, Chief Judge, and Deits and De Muniz, Judges. Attorney for Appellant is listed as Sally L. Avera, and attorney for respondent: Virginia L. Linder, the case was Affirmed Without Opinion. This case CAA85809 lists Sally L. Avera as Attorney for Appellant. This is a conflict of interest in that

her husband one Fred E. Avera prosecuted my case in the county of Polk.

Petitioner also claims that because of this conflict of interest that Sally L. Avera did willfully and knowingly agree with the State Prosecutors office to fire my Attorney Mr. David Allen and assign to me one Jesse Wm. Barton to replace one Mr. David Allen without any forewarning or fore-knowledge by the petitioner in said case.

Second Claim for Relief: Ineffective Assistance of Appellate Counsel.

Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter a notice of my intention to appeal in the Oregon ruling to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this is per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

Third Claim for Relief: Prosecutorial Misconduct.

Facts: Failure to Disclose Favorable Evidence. Fred E. Avera did willfully and knowingly withhold evidence that was relevant to my case and did enter into agreement with my Attorney David Hassenstab to keep said evidence out of court. This evidence being a photo showing that I had no black eye when arrested and my clothes which were covered with mud and witnesses state to the opposite. Also the prosecutor had the witness testify against me when said witness could not identify me as the one whom he testified against.

Prosecutor did knowingly and willfully show prejudice in my case by leading the Judge to illegally sentence me in the courts and disregard my constitutional rights.

Prosecutor did conspire with the courts of the State of Oregon to have me represented by illegal counsel when sent back to court for the third time on resentencing. The State did appoint me different counsel without regard for my rights as an individual.

Fourth Claim for relief: Ineffective Assistance of Counsel.

Facts: During my resentencing on September 19, 1995 the courts sent one Chris Lilleguard to represent me at my resentencing. I informed him that I did not except him as my attorney for the courts knew that I was being illegally detained at Yamhill County for the last 60 days and ~~failed~~ to inform me that I was given new counsel. The attorney than went to

court claiming that I refused to be present at my resentencing and came back and told me I could appeal my sentence. I stated he had no right to represent me. He then went back to court and had me called down, at which time the judge had me go pro se without proper representation. I objected to this but the Judge went ahead and resentenced me as the Courts had discussed ahead of time.

Fifth Claim for relief: Illegal incarceration by the order of the attorney Generals office.

Facts: In July 1995 the attorney Generals office did order me removed from Oregon State Prison and had me Illegally transferred to Yamhill County to hold me under false pretenses that I had a detainer in said county. But I was held there while the courts of Polk County took their time in deciding what they would do with me. This was done illegally and with intent to bring me undo pressure and to deprive me of due process under the Constitution of the United State and the statutes of the State of Oregon.

Sixth Claim Of Relief: Ineffective Assistance of Trial counsel.

Facts: Attorney David Hassenstab of Dallas Oregon, the county of Polk did fail to exercise professional skill and judgment in his acts and omissions which did effect the prosecution. This failure made it easier for me to be convicted. Mr. Hassenstab failed to object to and question witnesses with loyalty and pre-

sent evidence that was relevant to my defense. Mr. Hassenstab failed to use the private investigator whom presented him with evidence that there was no way that the crime could have been perpetrated as the witnesses stated. And that the investigation by the police was done weeks after the fact leaving out pertinent information.

Seventh Claim for Relief: The trial court erred when it did disregard the Court of Appeals' decision and sentencing defendant with prejudice, and without regard to Oregon law and Statutes.

Facts: The reason that this act is error and justifies relief on Post-Conviction is that according to the records and the decision of the Court of Appeals, the issue was that defendant's sentence should have been 121 to 130 months as a departure sentence. Also when the State of Oregon dropped the dangerous offender sentences they also dropped any reason for any upper departure sentence. And without the departure sentence the defendant's sentence should have not exceeded Grid 9-A with a sentence of 72-80 months, that going to gridblock 10-A was a departure sentence in itself.

Eighth Claim of Relief: The trial court erred when it found defendant guilty with prejudice, and without regard to constitutional and Oregon laws and Statutes governing a fair trial.

Facts: The reason this error justifies relief is that the court of Polk County before Judge Hitchcock was illegal and showed prejudice. At a pre-trial hearing, Judge Luukinen of Polk County withdrew himself from my case and ordered a judge to be brought in from another County. The prescutor Fred E. Avera, my attorney David Hassenstab, and Judge John Hitchcock did willingly violated said order. Also the defendant was denied a fair trial by giving the Judge a portfolio of the defendant's past thus prejudicing the case.

The following evidence was withheld from the trial courts that would have placed reasonable doubt on trial court's decision. (1) snow on the ground, (2) the defendant's clothing, (3) the alleged victim's record (which included giving false information to police officers), (4) the report of state hired investigator, and (5) the fact that the court allowed D. Peyton to testify for over an hour, giving derogatory testimony when the courts knew that said witness would not be able to identify defendant as assailant. Plus said witness did perjure himself when asked if he had discussed case with Rebecca Cantrel the alleged victim in the case when all the testimony was in fact hearsay and directed by prosecution.

Ninth Claim for Relief: Sentence was excessive and unconstitutional.

Facts: The courts applied an excessive sentence in which exceeded the maximum allowed

by law. The courts have twice found my sentence at trial to be illegal and unconstitutional. The court's did raise petitioner's sentence passed the appropriate grid as allowed by law as a departure sentence. Also the court's gave me consecutive sentences which apposed what was deemed a single episode or action. This and the length of sentence violated my eighth amendment rights to stand against cruel and unusual punishment.

Tenth Claim for Relief: Ineffective assistance of trial counsel:

Facts: Trial counsel David Hassenstab of Dallas, Oregon of Polk County did fail to investigate the facts and circumstances of the criminal charges at issue. This failure to present materials and facts in the case did lead to my conviction. I was coerced and threatened by counsel to waive my trial by jury, and to be tried by judge without a jury to ensure conviction. This against my amendment rights violating the 5th, 6th, and 14th amendment rights. Mr. Hassenstab did fail to challenge indictment that was filed with racial bias and discriminated without evidence or probable cause to commit crimes involved.

Appointed counsel was paid by respondent State as were Judge, and prosecutor to defraud the petitioner of all constitutional rights and to ensure conviction. This when counsel was facing unethical charges that were unbecoming to an attorney. Therefore said attorney did show

prejudice in said case when he implied to another prisoner that said petitioner was just another no good sex offender.

Eleventh Claim for Relief: Petitioner was and is denied the transcripts necessary to file a timely and accurate Post-Conviction.

Facts: The Petitioner in said case has filed to his appellant attorneys and to the courts of Polk County for the transcripts that pertained to Pre-trial transcripts before Judge Luukinen's Court, trial court proceeding and the court records before Judge Hitchcock in Feb. 1991. And also sentence procedure before Judge Hitchcock. I have sent copies and proof of service to Polk County Circuit Court and to Virginia Linder as was required. I was given no response from any of the people that I contacted. The State public Defenders Office did claim that said transcripts were sent to me by mail in Oregon State Prison in 1992 which I never received. I informed them that I never received said transcripts and was told that this was not their fault. I then informed them that I needed these transcripts and was informed that I would be held responsible for their replacement but was refused even the chance to replace them by the silence of the court and my attorneys office and the prosecutors office. Defendant can therefore show that the state prevented the discovery of necessary facts needed to raise the constitutional issues in this case.

And that procedural forfeiture is resulted from the ineffective assistance of counsel.

* * * *

The foregoing represents those statements in support of the claims of error asserted by Petitioner.

CONCLUSION

Based on the foregoing, Petitioner is entitled to Post-Conviction relief reversing the conviction and sentence, releasing petitioner from custody of Defendant and/or modifying Petitioner's sentence and for such further relief as the court deems just and proper.

Respectfully submitted:

s/Michael L. Reese

Michael L. Reese
SID# 3839164
2500 Westgate
Pendleton, OR 97801

ABSTRACT OF RECORD

PETITION

On May 22, 1996, petitioner filed a Petition for Post-Conviction Relief alleging, *inter alia*, ineffective assistance of counsel.

FORMAL PETITION

On August 28, 1996, petitioner filed a Formal Petition for Post-Conviction Relief, alleging, *inter alia*, ineffective assistance of counsel.

FIRST AMENDED FORMAL PETITION

On November 6, 1996, petitioner filed a First Amended Formal Petition for Post-Conviction Relief, alleging, *inter alia*, ineffective assistance of counsel.

ANSWER

On November 15, 1996, defendant filed an Answer to Petitioner's First Amended Formal Petition for Post-Conviction Relief, admitting petitioner's imprisonment, confinement and restraint of liberty by defendant, but denying that same is unlawful.

JUDGMENT

On June 18, 1997, based upon its findings of fact and conclusions of law, the court entered the following Judgment:

> The above case came on for trial on March 21, 1997, before the Honorable Rudy M. Murgo. Petitioner appeared in person and by his attorney, Wade Bettis, Jr., and defendant appeared

> by and through his attorney, Thomas Castle, Assistant Attorney General.
>
> The court, having considered all evidence and arguments before it,
>
> NOW, THERFORE, IT IS HEREBY ADJUDGED that based on the Court Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

* * * *

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHAEL L. REESE,

Petitioner-Appellant,

v.

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution,

Defendant-Respondent.

Umatilla County Circuit Court No. CV96-0561

CA A98705

ORDER OF SUMMARY AFFIRMANCE

Respondent has moved for summary affirmance pursuant to ORS 138.660 on the ground that this appeal presents no substantial question of law. Appellant has not opposed the motion. The motion is granted.

Affirmed.

s/Mary J. Deits
Chief Judge

FEB 9 1998
Date

C: Erika L. Hadlock
Mark Geller

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent [X] No costs allowed

NOTICE OF EXPENSES AND COMPENSATION

The appellate court has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665 to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses and compensation in the amount of $ 741.65.

Appellate Judgment COURT OF APPEALS
Effective Date: June 22, 1998 (seal)

APPELLATE JUDGMENT

IN THE SUPREME COURT OF THE STATE OF OREGON

MICHAEL L. REESE,

Petitioner on Review,

v.

G.H. BALDWIN, Superintendent, Eastern Oregon Correctional Institution,

Respondent on Review.

Trial Court No. CV96-0561

CA No. A98705

PETITION FOR REVIEW OF MICHAEL L. REESE

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Umatilla County, Honorable Rudy M. MURGO, Judge.

Opinion Filed: July 18, 1997

Affirmed by the Court of Appeals by Motion for Summary Affirmance.

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PETITION FOR REVIEW

Prayer for Review

Petitioner, Michael L. Reese, seeks review of the decision of the Court of Appeals dated February 9, 1998.

Statement of Legal Question(s) Presented on Review

Petitioner pleads several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Petitioner presents the legal question for review of whether his sentence is proper, particularly since he was subject to ineffective assistance of counsel and prosecutorial misconduct.

Statement of reasons for reversal of Court of Appeals

The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of both trial court and appellate court counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Statement of Facts

(A copy of the decision of the Court of Appeals is attached as App-1).

Petitioner is serving terms of 260 months for kidnaping in the first degree, and 260 months concurrent to the kidnapping charge for a second count of kidnapping in the first degree. Petitioner is also serving a sentence of 36 months consecutive

to the kidnapping sentence for a conviction of attempted sodomy in the first degree.

Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, Petitioner alleges claims of error with respect to improper waiver of a jury trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and inadequate appellate counsel.

Argument

The sentence levied upon the petitioner is improper in that Petitioner was subject to several errors with respect to this case, including improper sentencing, ineffective assistance of counsel, prosecutorial misconduct, improper waiver of jury and improper investigation.

Petitioner asserts that his imprisonment is in violation of ORS 138.530. Petitioner alleges that the sentence violates his eighth amendment rights against cruel and unusual punishment. Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th and 14th amendment rights have been violated.

Statement of reasons why issue requires Supreme Court decision

Consideration of the criteria set forth in ORAP 9.07 demonstrates why discretionary review of this case should be granted by the Supreme Court.

Petitioner contends that the Court of Appeals decision is wrong, resulting in a serious and irreversible injustice to Petitioner that can not be corrected by legislative clarification. Relief to the Petitioner can only come from this court.

The issue is clearly set fourth in the appellate briefs.

CONCLUSION

Petitioner received an excessive sentence and stated a valid claim for post conviction relief.

A decision by this court is essential.

Respectfully Submitted;

s/Marc Geller

Marc Geller OSB 97126
Attorney for Petitioner

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> The court, having considered all evidence and arguments before it,
>
> NOW, THEREFORE, IT IS HEREBY ADJUDGED that based on the Court Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed.

APPELLATE DECISION

On February 9, 1998, the Court of Appeals filed a decision summarily affirming the trial court judgment.

[Appendix and certificate of service omitted in printing.]